UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KHASEEM GREENE, Plaintiff, v. ELIZABETH POLICE DEPARTMENT, et al., Defendants.		CIVIL ACTION NO. 2:18-cv-08972

REPLY BRIEF IN SUPPORT OF UNION COUNTY UCPO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Despite all of the clamor and noise, hyperbole and breathless sensationalism in Greene's opposition brief (which alleges a wide-ranging conspiracy among UCPO Defendants to "frame an innocent man"), Greene's opposition brief is actually very quiet -- or at times, silent – as to why the well-established law set forth in UCPO Defendants' brief does not apply to bar Greene's claims against those defendants.

Deconstructed, almost all of Greene's claims against these defendants reduce to two central assertions: (1) UCPO Defendants should not have brought charges against Greene; (2) once charges were filed, UCPO Defendants should not have pursued those charges further. The law in this Circuit could not be clearer a prosecutor has absolute immunity regarding decisions to bring charges, "even where he acts without a good faith belief that any wrongdoing has occurred," *Kulwicki v. Dawson,* 969 F.2d 1454, 1464 (3d Cir. 1992). As to acts taken in subsequent pursuit of those charges, including reviewing evidence, deciding whether to continue with a prosecution, and presenting information to a grand jury (even knowingly false testimony), the Third Circuit likewise has unambiguously held that prosecutorial employees enjoy absolute immunities for those activities. *Davis v. Grusemeyer*, 996 F.2d 617, 629 (3d Cir. 1993) (holding decision to continue prosecution "is at the heart of the prosecutorial decision making process" and that prosecutors have absolute immunity for such decisions); *Burns v. Reed*, 500 U.S. 478, 490 (1991) (finding absolute prosecutorial immunity applies even to presentation of knowingly false testimony in grand jury proceedings); *Kulwicki*, 969 F.2d at 1467 (same). Greene suggests that these claims are not ripe for decision because

some discovery is required to "determine the timing and nature" of UCPO Defendants' acts before the court can determine whether these defendants were engaged in prosecutorial functions at the time, but that "stall tactic" cannot succeed given that the claims against these defendants set forth in the complaint undeniably concern alleged actions (charging Greene and continuing the prosecution) that are fundamental prosecutorial functions.

Greene also fails to refute the inexorable conclusion that sovereign immunity applies to the claims against UCPO Defendants, given that all of the claims against those defendants apply to those defendants' law enforcement and investigative functions related to the charges against Greene. *Coleman v. Kaye*, 87 F.3d 1491, 1505 (3d Cir. 1996). He contends that UCPO Defendants lack sovereign immunity because the State of New Jersey allegedly waived such immunity as to claims against prosecutors by enacting the New Jersey Tort Claims Act, but the Third Circuit has explicitly rejected the same argument in *Hyatt v. County of Passiac*, 340 Fed.App'x. 833, 837 (3d Cir. 2009).

Greene's opposition also does not refute the fact that the UCPO and all defendants sued in their "official capacity" are not "persons" who can be sued under § 1983 (and therefore also cannot be sued under the New Jersey Civil Rights Act, which adopts § 1983's definition of a "person"). *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 697 (3d Cir. 1995); *Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989). He suggests that some discovery is required to determine whether those defendants sued in their "official capacity" were instead acting as individuals, but an "official capacity" claim – by definition – applies only to the role as a state actor and not as an individual defendant. He also is demonstrably wrong in his

position that, because he has made claims against certain UCPO Defendants "in their individual capacity," those defendants are "persons" under § 1983. The law is clear that in a case like this, when a prosecutorial employee is sued for acts involving their law enforcement and investigatory functions, that prosecutorial employee is not a "person" for purposes of § 1983 when performing this prosecutorial functions. *Michaels v. State of N.J.*, 968 F. Supp. 230, 236 (D.N.J. 1997), aff'd, 150 F.3d 257 (3d Cir. 1998).

As for his Greene's claims about alleged discrimination, and about UCPO's supposed failure to screen, hire and train personnel to avoid employees with discriminatory tendencies, Greene does not even respond to UCPO Defendants' argument that these factually-unsupported and vague claims of discrimination fail as a matter of law. *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009).

Even if Greene's claims were not subject to dismissal for the reasons set forth above, the claims against these defendants still should be dismissed based on qualified immunity. As shown in UCPO Defendants' moving brief, the facts known to these defendants met the standard for "probable cause," which "is not a high bar." *District of Columbia v. Wesby*, __ U.S. __, 138 S.Ct. 577, 586 (2018). Greene has failed to identify for the court "controlling authority" or a "robust consensus of cases of persuasive authority" putting "beyond debate" that fact prosecutors would be violating Greene's constitutional rights in relying on a statement incriminating Greene from another witness, when, after making that state, the witness allegedly told police officers – not any of the UCPO Defendants – that he had lied in the portion of his statement incriminating Greene.

RESPONSE TO GREENE'S "STATEMENT OF FACTS"

For the most part, UCPO Defendants rely on the statement of facts in their moving brief, but they are compelled to address a number of factually inaccurate or misleading statements in Greene's opposition brief before addressing the legal issues in this case. As a first matter, Greene repeatedly and inaccurately claims that his allegations against all of UCPO Defendants involved alleged "fabrication of evidence" by these defendants prior to charges against him being filed. In so doing, Greene attempts to rewrite the complaint's allegations.

The actual allegations in the complaint contend that, after interviewing suspect Jason Sanders, defendant Alfonso Colon, an Elizabeth police officer, supposedly spoke with a single prosecutor, defendant Patricia Cronin, to provide Cronin with an update on the status of the investigation into the shooting. *See* ECF Doc. 1, ¶ 41. The Complaint alleges that Sanders initially had told Colon and Elizabeth police officer James Szpond that Greene had handed Grene the gun used in the shooting, but that Sanders told those police officers later in the same interview that he had lied when asked if the information he had provided about Greene was true. *Id.* at 39. The complaint indicates that, after interviewing Sanders, Colon conferred with Cronin about the status of the investigation, and Cronin approved charges being brought against Greene. *Id.* at 41. Greene does not alleged that any other Prosecutor Defendant was involved in the decision to pursue charges. Thus, the complaint is devoid of any factual allegation about "evidence fabrication" by any Prosecutor Defendant other than Cronin before charges were filed against Greene.

Moreover, as to defendant Cronin, Greene does not provide any factual basis for the contention that Colon told Cronin either that: (1) Sanders told Colon and Szpond at the conclusion of their interview that he had lied about Greene's involvement; or (2) that surveillance video did not show Greene handing a gun to Sanders. Although the complaint alleges that several Elizabeth police officers may have viewed the surveillance video, it does not allege that Cronin, or any other Prosecutor Defendant, viewed the video prior to the filing of charges against Greene. In some portions of the brief, Greene suggests that UCPO Defendants lack immunity because they may have provided legal advice to the investigating Elizabeth police officers about whether probable cause existed for charges against Greene, but the Complaint does not contain any factual allegation that any Prosecutorial Defendant was asked for, or gave, any legal advice on that topic.

Aside from these largely conclusory claims against Cronin and the initial decision to charge Greene, all other allegations about the use of alleged "fabricated evidence" concern actions taken after Greene had been charged. For instance, the complaint focuses on how UCPO Defendants presented the evidence to the grand jury. Id. at ¶ 48- 49. As shown herein, the UCPO Defendants have absolute immunity from such claims, even assuming for the purposes of this motion the truth of the complaint's allegations.

ARGUMENT

POINT I

UCPO DEFENDANTS HAVE SOVEREIGN IMMUNITY FROM PLAINTIFF'S FEDERAL LAW AND NJCRA CLAIMS.

As noted in UCPO Defendants' moving brief, it is undeniable that Prosecutors' offices and prosecutorial staff sued for engaging in classic law enforcement and investigatory functions have immunity from such claims. *Coleman*, 87 F.3d at 1505. In *Coleman*, the Third Circuit indicated that this immunity does not apply to "administrative tasks unrelated to their strictly prosecutorial functions" and offered as example of such administrative tasks "a decision whether to promote an investigator." Plainly, the actions of the UCPO Defendants here are not the type of "administrative" tasks that fall outside this immunity. Instead, the allegations involved the decision whether to file criminal charges, decisions about what evidence to present to a grand jury, and whether to continue a prosecution – core activities of a prosecutor that the Third Circuit has identified as being state action that is protected by sovereign immunity.

Given that the specific activities of the individual UCPO Defendants involved classic law enforcement and investigatory activities – deciding whether to pursue charges, about what evidence to present to a grand jury, and about whether to continue a prosecution -- sovereign immunity also bars all claims brought against the individual UCPO Defendants in their "official capacity." The case law in this Circuit is unambiguous that individual prosecutor defendants performing such functions enjoy sovereign immunity. *See*

at 832–33 (3d Cir. 2009); *Coleman*, 87 F.3d at 1500-02; *Pitman v. Ottehberg*, 2015 WL 179392 (D.N.J. Jan. 14, 2015); *Wright v. State*, 778 A.2d 443, 456–58 (2001); *In re Camden Police Cases*, 2011 WL 3651318; *Johnson v. Stith*, 2015 WL 4997413 (D.N.J. Aug. 20, 2015).

In a last ditch-effort to avoid dismissal based on sovereign immunity, Greene erroneously claims that UCPO Defendants lack sovereign immunity because the State of New Jersey supposedly allegedly waived such immunity as to claims against prosecutors by enacting the New Jersey Tort Claims Act. However, in *Hyatt v. County of Passiac*, 340 Fed.App'x. 833, 837 (3d Cir. 2009), the Third Circuit considered and explicitly rejected the argument that the New Jersey Tort Claims Act waives a prosecutor's right to assert sovereign immunity in federal court.

POINT II

PLAINTIFF'S § 1983 CLAIMS AGAINST PROSECUTOR DEFENDANTS IN THEIR "OFFICAL CAPACITIES" SHOULD BE DISMISSED BECAUSE THEY ARE NOT "PERSONS" UNDER § 1983.

The individual UCPO Defendants cannot be sued in their "official capacity" under 42 U.S. § 1983, because, in their official capacities, they are not "persons" amenable to suit under that statute. The Supreme Court has unequivocally held that States and State officials "are not 'persons' within the meaning of § 1983 and, therefore, cannot be among those held liable for violations of the civil rights statute." *Blanciak*., 77 F.3d at 697; *Will*, 491 U.S. at 70-71. Moreover, the Third Circuit has specifically held that "when county prosecutors engage in classic law enforcement and investigative functions, they act as officers of the State." *Coleman*,

87 F.3d at 1505. Thus, all claims under § 1983 against UCPO Defendants should be dismissed with prejudice.

POINT III

PLAINTIFF'S CLAIMS AGAINST PROSECUTOR DEFENDANTS, IN THEIR INDIVIDUAL CAPACITIES MUST BE DISMISSED BECAUSE THEY HAVE ABSOLUTE PROSECUTORIAL IMMUNITY FROM SUCH CLAIMS.

Greene erroneously claims that this case must move forward and discovery must be taken because of some alleged need to perform a "functional analysis" of the Prosecutorial Defendants' actions and to develop a record as to the "temporal proximity" of those actions to the judicial process, seemingly ignoring that his complaint identifies the exact acts of UCPO Defendants he alleges were wrongful, and at what point in the proceedings they were performed.

To recap, Greene first claims that Cronin was involved in the decision to charge him, which he claims was wrongful. *See* ECF No. 1, ¶¶ 41-43. Greene then claims that Prosecutor Defendant Stephen Kaiser, along with, or at the direction of Prosecutor Defendant Deborah White, then presented "manufactured or fabricated" evidence to the grand jury and omitted to present other evidence to the grand jury. *Id.* at ¶¶ 48-49. After Greene was indicted, Prosecutor Defendant Mark Spivey, a communications officer for the UCPO, issued a press release that reported that charges had been brought against Greene and the allegations against Greene underlying those charges. *Id.* at ¶ 53. Greene then asserts that the UCPO did not dismiss the criminal charges against him until July 17, 2017, although the UCPO was allegedly

aware well before that date that probable cause did not exists for the criminal charges against Greene. *Id.* at ¶¶ 58-70. Thus, the alleged wrongful actions of each Prosecutor Defendant are clearly identified, so this court can perform any required "functional analysis," and the "temporal proximity" of these acts to the specific stages of the prosecution are clearly defined.

Moreover, as discussed below, courts in this Circuit have provided clear guidance about whether absolute prosecutorial immunity attaches to the specific activities at issue in Greene's complaint -- the filing of criminal charges, the presentation of evidence to a grand jury, and the decision whether to dismiss pending criminal charges. The law is clear that each of those activities has been identified as a core prosecutorial function for which a prosecutor defendant enjoys absolute immunity.

The Third Circuit thoroughly explained the scope of absolute prosecutorial immunity in *Kulwicki*, 969 F.2d 1454, stating:

> The decision to initiate a prosecution is at the core of a prosecutor's judicial role. *Imbler,* 424 U.S. at 430–31, 96 S.Ct. at 994–96. *See Rose,* 871 F.2d at 343. A prosecutor is absolutely immune when making this decision, even where he acts without a good faith belief that any wrongdoing has occurred. *See Rose,* 871 F.2d at 347 n. 12; *Joseph v. Patterson,* 795 F.2d 549, 557 (6th Cir.1986), *cert. denied,* 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 516 (1987). Harm to a falsely-charged defendant is remedied by safeguards built into the judicial system -- probable cause hearings, dismissal of the charges -- and into the state codes of professional responsibility. *Burns,* 111 S.Ct. at 1939, 1942.
>
> [969 F.2d at 1463-64.]

In *Kulwicki*, the plaintiff, Kulwicki, alleged that the prosecutor, Dawson, had brought meritless charges against him because he was a political rival. Even though the Third Circuit

found that Dawson's actions were "not above suspicion" as having been politically motivated, the court nonetheless held that the Supreme Court's decisions on prosecutorial immunity mandated a dismissal of Kulwicki's claims relating to the filing of charges, explaining:

> Functionally, Dawson's actions are absolutely immune. Dawson was performing a core prosecutorial function in causing Loutzenhiser to file criminal charges against Kulwicki. As noted above, malicious prosecution was given immunity at common law. *See Burns,* 111 S.Ct. at 1938. Admittedly, the facts are not above suspicion: the conspiracy charge was filed on October 13, and Dawson recused himself from the case later that day. Yet, the Supreme Court has made clear that "the relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.'" *Mireles v. Waco,* 502 U.S. 9, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991). The district court's denial of Dawson's claim of absolute immunity for initiating Kulwicki's prosecution will be reversed, and that particular claim remanded to the district court with instructions that it be dismissed.
>
> [969 F.2d at 1464.]

As in *Kulwicki*, Greene alleges in this case that Cronin caused the filing of meritless criminal charges against him. The court does not require any further functional analysis of Cronin's actions or to receive additional information about the "temporal proximity" of Cronin's actions to decide this motion. *Kulwicki* makes clear that Cronin has absolute immunity as to any charging decision. Because Greene does not even alleged that any other Prosecutor Defendant was involved in the charging decision, any claims as to the other UCPO Defendants related to the filing of charges against Greene must be dismissed.

As to Greene's claims against Kaiser and White that concern what evidence was or was not presented to the grand jury and whether Kaiser and White presented "manufactured or fabricated" evidence to the grand jury, longstanding Supreme Court precedent, and

subsequent decisions from this Circuit applying that precedent, make clear that Kaiser and White have absolute immunity from such claims. As the Supreme Court has noted, even a "malicious or dishonest action" by a prosecutor is entitled to absolute immunity, so long as the action is part of the judicial process. *Imbler*, 424 U.S. at 430-32. The Supreme Court in *Imbler* held that such absolute immunity exists even when a prosecutor uses perjured testimony at a judicial proceeding, such as a trial or grand jury proceeding. *Ibid.* Courts in this Circuit have since held that prosecutorial employees have absolute immunity for the use of perjured testimony in a grand jury proceeding. *Rose v. Bartle*, 871 F.2d 331, 344-45 (3d Cir. 1989).

As for Kaiser's and White's alleged failure to present information that would have been exculpatory of Greene, those defendants plainly have absolute prosecutorial immunity as to that claim. The Third Circuit has held, "It is well settled that prosecutors are entitled to absolute immunity from claims based on their failure to disclose exculpatory evidence, so long as they did so while functioning in their prosecutorial capacity" *Yarris v. County of Del.,* 465 F.3d 129, 137 (3d Cir. 2006); *see also United States v. Williams,* 504 U.S. 36, 51 (1992) (same).

Absolute prosecutorial immunity also applies to Greene's claims that UCPO Defendants should have more quickly dismissed the charges against him. In *Davis*, the Third Circuit observed that the decision whether to continue a prosecution "is at the heart of the prosecutorial decision making process." 996 F.2d at 629. Immunity from such claims has thereafter been recognized in several subsequent district court decisions. *See Iantosca v. Magnone*, 2017 WL 3065214 (July 19, 2017); *Newsome v. City of Newark*, 2014 WL 4798783 (Sept. 25, 2014).

The authority cited by Greene in his brief, *Wilson v. Russo*, 212 F.3d 781 (3d Cir. 2000), concerned whether continuation of a custodial arrest after an arresting officer determined he no longer had probable cause violated the Fourth Amendment, and that case did not decide that issue, and instead affirmed a dismissal of the claims against the arresting officer in that case, based on qualified immunity. *Id.* at 793. It has no application to the facts and the issues in this case. Moreover, Greene cites to several authorities that suggest that prosecutors wrongly bring criminal charges against a person may themselves be charged with a criminal offence or subject to professional discipline, see opposition brief at 18-19, ignoring the fact that those cases hold that civil claims cannot be brought against a prosecutor because of the availability of those other non-civil remedies. *See Imbler*, 424 U.S. at 432, n.34.

POINT IV

GREENE'S CONCLUSORY CLAIMS BASED ON ALLEGED DISCRIMINATION AGAINST HIM, AND THE SCREENING, HIRING AND TRAINING OF EMPLOYEES WITH ALLEGED DISCRIMINATORY TENDENCIES FAIL AS A MATTER OF LAW.

As noted in UCPO Defendants' moving brief, plaintiff's complaint included conclusory allegations, without any underlying factual support, that Defendants, "were motivated by racial, ethnic, national origin, and/or other unlawful animosity and/or by desire to injure, oppress and intimidate the Plaintiff because of his race, ethnicity, national origin, or other protected attribute." See e.g., ECF, Doc. No. 1, ¶¶ 93, 95. As noted in UCPO Defendants' moving brief, Greene does not event state which of these factors -- his race, ethnicity, national origin, or some other unidentified but nonetheless protected attribute – supposedly motivated

UCPO Defendants. Greene's opposition to this motion does not even address these claims, let alone provide a legal or factual basis why they should survive. As such, they should be dismissed.

Similarly, Greene's claim based on alleged failure by UCPO to screen and train employees to prevent alleged bias were devoid of any supporting factual allegations in the complaint, and his opposition does not address UCPO's arguments for dismissal of these claims, either. Therefore, they should be dismissed.

POINT V

UCPO DEFENDANTS HAVE QUALIFIED IMMUNITY FOR GREENE'S CLAIMS

As noted in UCPO Defendants' moving brief, public officials enjoy qualified immunity from claims of constitutional deprivations, unless the conduct that the public official engaged in has been found by "controlling authority," a "robust consensus of cases of persuasive authority" "beyond debate" to violate constitutional rights. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). To the extent that Greene addresses qualified immunity, he suggests that qualified immunity does not apply because the defendants "despite having video of the entire incident" swore out an affidavit that had the effect of misleading the court into issuing an arrest warrant. Obviously, not all of the defendants swore out a warrant, and the Complaint makes referense to only one person who supplied such an affidavit, defendant Colon, who is not a UCPO Defendant. As to the alleged actions of the UCPO Defendants, the sole allegation that can be gleaned from the opposition brief is that they failed to review video and to prevent defendant Colon from making an allegedly false statement in an affidavit for a warrant. Greene

has supplied no "controlling authority" or "robust consensus of persuasive authority" that has held that such conduct – allowing a criminal charge to be asserted because a defendant has not reviewed available evidence that might disprove the alleged factual basis for that charge in another officer' clearly violates a constitutional right, and therefore UCPO Defendants have qualified immunity as to the claims against them.

POINT VI

UCPO DEFENDANTS HAVE IMMUNITY FROM GREENE'S STATE LAW CLAIMS FOR MALICIOUS PROSECUTION, ABUSE OF PROCESS, NEGLIGENCE AND DEFAMATION

The allegations of the Complaint and Greene's opposition brief do not allege conduct by UCPO Defendants that would constitute "a crime, actual fraud, actual malice or willful misconduct" by UCPO Defendants, and therefore, these defendants are entitled to dismissal based on N.J.S.A. 59:3-8. Plaintiff offers no factual basis for any allegation that UCPO Defendants bore any malice towards Plaintiff, or engaged in willful misconduct. As he often does in his opposition brief, Greene blends together the claims against UCPO Defendants and other defendants. However, review of his opposition brief as to the exception for "crime, fraud, malice or willful misconduct" exception to prosecutorial immunity under N.J.S.A. 59:3-14 reveals that Greene identifies the following as the alleged factual basis for his assertion that that exception applies: "police and prosecutors intentionally conspired to create false reports, falsely swore out affidavits in support of arrest warrants they knew they did not have probable cause to seek, and presented perjured testimony to the Grand Jury." *See* opposition brief at 27. The Complaint is bereft of any factual support for the assertion that any Prosecutor

Defendant was involved in the preparation of police reports, and none of the UCPO Defendants are alleged to have sworn out any affidavits in support of arrest warrants. Thus, because no factual basis exists for such claims as to UCPO Defendants, they must be dismissed, and N.J.S.A. 59:3-14 is inapplicable. As for the alleged presentation of perjured testimony, such a claim could only apply to UCPO Defendants Kaiser and White, who are alleged to have been involved in the grand jury proceedings. However, a bare claim that those two UCPO Defendants allegedly presented "perjured testimony" to the grand jury is insufficient to invoke the exception for "crime, fraud or malice" in N.J.S.A. 59:3-14. The Complaint is devoid of any allegation that the defendants who presented evidence to the grand jury knew that any of the information presented to the grand jury was false and elected to present it anyway.

POINT VII

ABUSE OF PROCESS CLAIMS APPLY ONLY TO CIVIL ACTIONS FILED AGAINST A PARTY, AND THEREFORE THE ABUSE OF PROCES CLAIM FAILS AS A MATTER OF LAW

UCPO Defendants' motion sought dismissal of Greene's claims about alleged abuse of process, Count Eight of the Complaint, in a portion of the Complaint that clearly seemed to relate to claims arising under New Jersey state law. Greens does not contest that, under New Jersey state law, an abuse of process claim may be pursued only with respect to the filing of a civil law suit, *LoBiondo v. Schwartz*, 970 A.2d 1007, 1023 (N.J. 2009), which would require the dismissal of this claim is it is asserted under state law.

In an attempt to rescue this claim, Greene suggests that Count Eight actually concerns

not a state-law claim, but rather an abuse of process claim under § 1983. Putting aside the fact that Greene did not plead this as in the Complaint as an alleged violation of § 1983, Greene still cannot maintain an "abuse of process" claim under federal law either, if that is what he intended to pursue. A § 1983 claim for abuse of process, by definition, requires alleged conduct by the defendants beyond the bringing of allegedly unwarranted criminal charges. The Third Circuit has held that a section 1983 claim for malicious abuse of process lies if "prosecution is initiated legitimately and thereafter is used for a purpose other than that intended by the law." *Rose v. Bartle*, 871 F.2d 331, 350 (1989). This is not the nature of the claim Greene makes and he fails to identify in his opposite brief some "purpose other than that intended by the law" that UCPO Defendants were supposedly pursuing.

Thus, whether Greene's abuse of process claim is one under New Jersey law or § 1983, it still fails as a matter of law and should be dismissed.

POINT VIII

GREENE'S DEFAMATION CLAIM FAILS AS A MATTER OF LAW BECAUSE HE CANNOT DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT SPIVEY KNOWINGLY AND WITH MALICE MADE FALSE STATEMENTS, AND THE INFORMATION DISCLOSED IS MANDATORY TO DIVULGE UNDER NEW JERSEY'S OPRA STATUTE

Although Greene's Complaint asserts a defamation claim against only one person, Mark Spivey, his opposition brief suggests that he had pursued such a claim against all UCPO Defendants. He cannot "amend" his Complaint "on the fly" to assert this claims against

additional defendants. The defamation claim is limited to (and, by extension, against UCPO), and it fails as a matter of law.

The New Jersey Supreme Court has set forth that, in addition to damages, the elements of a defamation claim are as follows: "(1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting to at least negligence by the publisher." *DeAngelis v. Hill*, 847 A.2d 1261, 1267-1268 (2004). It is a plaintiff's burden to prove each element of the defamation claim by clear and convincing evidence. *Russo v. Nagel*, 817 A.2d 426, 431 (2003).

As noted in UCPO Defendants' moving papers, where, as here, the communication at issue involves a "matter of public concern," the actual malice standard applies. *Durando v. Nutley Sun*, 37 A.3d 449, 458 (2012). A statement made with actual malice requires that the statement was made knowing it was false or with reckless disregard for whether it was false or not. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). To establish "reckless-disregard-for-the-truth," the plaintiff must prove that the defendant made the statement with a high degree of awareness of [the statement's] probable falsity." *Durando,* 37 A.3d at 459 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

Moreover, Spivey has qualified immunity for any alleged defamatory statement. "[A] conditional or qualified privilege . . . is designed to advance the important public interest in unrestrained speech while retaining a measure of protection for the plaintiff who is maliciously defamed." *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 355, 337 (1959). "The policy is an accommodation of competing social and political interests for the good of all: the protection

of the reputations of individuals, on the one hand, and on the other the collective security and the 'interests of the public in the fullest freedom of officials to make disclosures on matters within the scope of their public duties …'" *Id.* at 376 (quoting *Barr v. Matteo*, 355 U.S. 171 (1957)). The purpose of the qualified privilege, then, is to give the person who utters defamatory words that are in fact untrue protection from legal liability for that defamation if those words are uttered in furtherance of the policy that the qualified privilege is designed to accommodate." 29 N.J. at 375

In determining whether the qualified privilege applies to a communication, it is "irrelevant whether the statement at issue was defamatory." *Feggans v. Billington*, 291 N.J. Super. 382, 393 (App. Div. 1996). Rather, the examination focuses on the circumstantial justification for the publication of the allegedly defamatory information. Specifically, the court should consider the appropriateness of the occasion of which the claimed defamatory statement is published, the legitimacy of the interest sought to be protected/promoted by making the statement, and the pertinence of the receipt of the information by the recipient. *See Feggans*, 291 N.J. Super. at 393. "[T]he critical determination is whether, on balance, the public interest in obtaining information outweighs the individual's right to protect his or her reputation." Id. at 393.

"A qualified privilege may be overcome only if there is a showing of express or, as it is sometimes called, actual malice." *Cashen v. Spann*, 125 N.J. Super. 386, 406 (App. Div. 1973), *rev'd in part on other grounds*, 66 N.J. 541 (1975). "Such malice is to be distinguished from that of implied malice which may be inferred from the falsity of [the statement itself] . . . No such

inference of express or actual malice can be drawn from the mere fact that the libelous or slanderous words were false." Ibid. (text and citations omitted). Thus, the mere fact that a statement is defamatory does not establish that the speaker acted with actual malice. See, e.g., *Dijkstra v. Westerink*, 168 N.J. Super. 128 (App. Div.) (holding that defendant's report to police that plaintiff may have fired a bullet recovered from his garage, though mistaken, was protected by qualified privilege), *certif. denied*, 81 N.J. 329 (1979).

A malicious (and non-privileged) defamatory statement is to be distinguished from a merely mistaken (and privileged) defamatory statement. "[Express malice] must encompass a purpose to make the publication, not primarily for the purpose for which the privilege is bestowed, but for some wrongful motive such as ill will or to accomplish an objective not within the purpose of the privilege." *Cashen*, 125 N.J. Super. at 406-07.

Once the privileged nature of the defamatory statement is established, there is a presumption that it was made in good faith and with an honest belief in its truthfulness. The burden of proving the existence of the privilege rests with defendant and the burden of proving it was not made in good faith rests with plaintiff. *Id.* at 407. "Proof of an abuse of a qualified privilege must be established by the high evidentiary standard of clear and convincing evidence." *Feggans*, 291 N.J. Super. at 395.

Greene does not contest the fact that Spivey was merely the "Director of Communications" for UCPO, and the Complaint does not suggests that Spivey had any involvement in the investigation or bringing of charges against Greene. As such, there is plainly no basis to suggest that Spivey was intimately familiar with the investigation or has

reviewed the evidence in the criminal case against Greene and would have been aware of any alleged false statements about Sanders having implicated Greene, or about alleged misleading statements about the contents of surveillance videos. Given that Greene is required to demonstrate that Spivey issued any press release concerning Greene "with a high degree of awareness of . . . probable falsity" about the contents of that statement, the claims against Spivey cannot succeed and should be dismissed.

Greene also does not dispute that the information that Spivey might have imparted information to the press was consistent with the contents of the criminal complaint against Greene and the grand jury indictment, or dispute that New Jersey Open Public Records Act ("OPRA") guidelines mandates that the contents of any criminal complaint and/or indictment are to be provided upon a request by the press.

Furthermore, Greene's Complaint and opposition brief do not provide any basis that would defeat Spivey's claim of qualified privilege with respect to any press releases. Given that Spivey was passing along to the general public, through the media, information about an event of public significance – a shooting that took place on the streets in an area in which a large number of people were present, "[the public interest in obtaining information" about that evidence outweighs Greene's "right to protect his or her reputation." *See Feggans*, , 291 N.J. Super. at 393.

Therefore, under the clear law of New Jersey, any defamation claims against Spivey should be dismissed, as well as any claim against UCPO, which are dependent on Spivey's liability.

CONCLUSION

Based on the foregoing, Plaintiff's Complaint should be dismissed as to the UCPO Defendants.

Respectfully submitted,

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